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# TERRY AND THE RELEVANCE OF POLITICS

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My commentary will be congenial with those of Judge Weinstein and Randy Kennedy insofar as I would characterize myself as a *Terry*<sup>1</sup> supporter rather than a *Terry* opponent. Therefore, I'll be arguing against some of the points that Tracey Maclin has made—with a caveat. The caveat is that Tracey Maclin has made incredibly good points for the case that *Terry* was wrongly decided *when* it was decided. The question we must answer today, however, is whether *Terry* is right for *today*.

Professor Maclin argues that the *Terry* Court should have followed the *Miranda*<sup>2</sup> Court model—a model in which the Court takes a more interventionist approach to law enforcement practice to insure that liberty interests are protected.<sup>3</sup> Professor Maclin might also find the Court's approach in *Papachristou*<sup>4</sup> to be supportive of his argument. *Papachristou*, as I will argue in a moment, shares similarities with *Terry*, although the cases came out differently.

In both *Miranda* and *Papachristou* the Supreme Court adopted an approach that I believe was obviously right for the time in which those cases were decided. What is not so clear, however, is whether those principles are readily applicable to the current political and social context. Professor Maclin is concerned about the protection of rights of Black people today. So am I. However, I am more confident than Professor Maclin is, about the contemporary relevance of the principles embodied in *Terry*.

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<sup>1</sup> *Terry v. Ohio*, 392 U.S. 1 (1967).

<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436 (1965) (holding that under the Fifth Amendment a suspect shall not be compelled to be a witness against himself and must be apprised of his right to counsel).

<sup>3</sup> See Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271 (1998).

<sup>4</sup> *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1971).

I will make this argument by focusing on the connection between *Terry* on the one hand, *Papachristou*, on the other, and the relationship of both of these cases to modern community policing practices. Politics will loom large in this discussion.

Both Professors Maclin and Kennedy have talked about the effects of institutionalized racism on Black communities. History clearly demonstrates that institutionalized racism disabled Black people from holding law enforcers politically accountable to them. There are at least two predictable effects when Black people are unable to hold law enforcers politically accountable to them.

The first, Professor Maclin emphasizes, is overpolicing. Professor Kennedy emphasizes the second, underpolicing. These twin factors supply the main reasons why Black communities in the sixties were profoundly dissatisfied with the police services that they received.

It is against the background of these twin factors that the Court fashioned its well-known array of procedural protections in criminal cases like *Miranda* and *Papachristou* and many of the other search and seizure cases decided during the sixties.<sup>5</sup>

During this period the Court fashioned what I will call the "sixties conception of rights." That conception of rights is animated by two principles. The first is community distrust, and the second is discretion skepticism.

The community distrust principle can be useful when an entire segment of the relevant local political community is disenfranchised and despised. In such a situation, there is no reason to presume that the democratic approval given to invasive law enforcement procedures or laws is evidence that the individuals who will be most affected by these procedures and laws view their impact on liberty as justified by their contribution to order. This, of course, is the typical approach to articulating procedure in the criminal law area. We presume that the democratic process dictates the appropriate balance between liberty and order. But when one group is excluded, there is much less reason to trust so-called democratic judgments.

The courts in such a situation understandably adopt a position of community distrust. We have clear evidence of this phe-

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<sup>5</sup> The argument that follows is developed at greater length in Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998).

nomenon in *Papachristou*. In that case, the Court invalidated a very vague Florida loitering law.<sup>6</sup> I believe that the Court was responding to the distorting effects of institutionalized racism on the criminal justice system, even though it never mentioned anything about race or racism. The author of *Papachristou*, Justice Douglas, made such a point elsewhere prior to writing the opinion in the case. Justice Douglas wrote, in a Yale Law Review article in 1960, that it is naive to defer to the community's approval of vagrancy and loitering laws because those arrested typically come from minority groups with insufficient political clout to protect themselves from an "easy laying-on of hands by the police."<sup>7</sup>

Professor Maclin echoes this point in his critique of *Terry*.<sup>8</sup> And, again, given the period in which *Terry* was decided, his argument is likely well-founded. Is it well-founded today? Before I answer that question, let me turn to the second principle.

Discretion skepticism is the second principle that animated decisions such as *Papachristou* and *Miranda*. Discretion skepticism is, of course, responsive to institutional racism by insisting that law enforcement be exercised according to very precise rules. By imposing such rules on law enforcers, courts impeded the responsiveness of law enforcers to the demands of racist white political establishments. In this way, discretion skepticism is an anti-delegation doctrine.

Community distrust and discretion skepticism are key features of a case like *Papachristou*. *Papachristou* is very relevant to our discussion of *Terry*, of course, because it is all about low-level interactions between police and the policed in urban areas—and about interactions between police and minorities, in particular.<sup>9</sup>

In Professor Maclin's view, however, *Terry* fails precisely because it does not share these features of *Papachristou*. Because it does not, Professor Maclin worries that the *Terry* doctrine

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<sup>6</sup> See FLA. STAT. ANN. §856.02 (West 1994) (repealed 1972). The defendants were actually convicted under a Jacksonville vagrancy ordinance which was very similar to the Florida statute. See *Papachristou*, 405 U.S. at 157 n.2. The Court vacated a conviction under the Florida law in light of *Papachristou*, in a companion case, *Smith v. Florida*, 405 U.S. 172 (1972).

<sup>7</sup> William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 Yale L.J. 1, 13 (1960).

<sup>8</sup> See Maclin, *supra* note 3.

<sup>9</sup> See *Papachristou*, 405 U.S. at 162.

provides far too little protection for minorities who encounter the police.<sup>10</sup>

To justify his argument, Professor Maclin tells us a great deal about political and social landscapes of the fifties and sixties. He cites compelling evidence quoted from the Kerner Commission Report.<sup>11</sup> His data should cause us to be worried about the prudence of *Terry* for 1968. But what about 1998?

What I want to argue now is that even if *Terry's* flexibility wasn't so great for 1968, *Terry* does provide a useful framework for 1998. The kind of flexibility *Terry* calls for embodies principles that are more useful to inner city Blacks than the rigid model of rights developed in cases such as *Papachristou*. This is in part because, as Judge Weinstein has so aptly noted, the political and social landscape has changed immensely since 1968.<sup>12</sup> Perhaps we have not achieved all that we would like to achieve, but things have changed a great deal since the Voting Rights Act of 1965<sup>13</sup> was enacted. The results of that law are obvious and dramatic. There are minority people at all levels of government—federal, state, and local.<sup>14</sup> Moreover, because of these changes, police forces have changed immensely in step with the demographic changes in political office.

In short, it is just not plausible to presume that an antagonistic relationship must exist between minority individuals and the police. In fact, in many urban areas, African Americans are demanding innovative law enforcement solutions to the crime problems that they face.

Consider the situation in Chicago, which I will focus on specifically because that is where I do most of my research. Minorities in Chicago are using their growing political power to secure innovative solutions to the crime problems that they experience. Black Chicagoans, like urban African Americans elsewhere, are supplying the political energy behind the resurgence of curfew laws, loitering laws, and the like.

Importantly, many minorities view these laws as tolerable

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<sup>10</sup> See Maclin, *supra* note 3.

<sup>11</sup> See *id.*

<sup>12</sup> See Jack B. Weinstein & Mae C. Quinn, *Terry, Race, and Judicial Integrity: The Court and Suppression During the War on Drugs*, 72 ST. JOHN'S L. REV. 1323 (1998).

<sup>13</sup> Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994)).

<sup>14</sup> See Kahan & Meares, *supra* note 5, at 1154.

modern alternatives to the draconian law and order, drug law enforcement that Judge Weinstein mentioned earlier.<sup>15</sup>

Now, it is important to see that an application of the conception of rights most clearly illustrated by *Papachristou*, in which community distrust and discretion skepticism are the primary features, cuts these imminent community-based reforms off at the start. I think this is a bad outcome.

It's bad because it stifles insurgent political energy in urban minority communities and incentives to establish political channels between minority individuals and local governments. Such an outcome exacerbates a bad situation by contributing to alienation of minorities in these communities.

This situation heightens a strange paradox. Prior to the civil rights movement, disenfranchised minorities were abused and no one was listening to them. They pushed for individual rights to address that situation. Today, however, minorities increasingly are enfranchised and attempting to push for legislation that meets their particular needs, and the same schedule of rights that provided them with relief before, too often, is being used to prevent them from determining a course for their communities that they deem best.

There is another reason why the *Papachristou* interpretation of rights may be inferior to *Terry's* more flexible approach when it comes to modern policing that addresses the needs of minorities who live in crime-plagued urban areas. Alternative law enforcement strategies often expose minority individuals to stiffer, prison-based sentences that are imposed after the occurrence of a crime that is more serious than the low-level activity addressed by curfews and loitering laws.

By enforcing some of these low-level policing alternatives as the first panel mentioned earlier, we can cut off robbery, homicide, and maybe even drug crimes.

Finally, adherence to the *Papachristou* model may be bad for minority residents of urban communities precisely because in many low-level policing situations it really does very little to address the problem of police discretion, which is Professor Maclin's primary target. Striking down a loitering law like the one that was recently struck down by the Illinois Supreme Court in

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<sup>15</sup> See Weinstein & Quinn, *supra* note 12.

Chicago doesn't meaningfully cabin police discretion.<sup>16</sup> Police *still* have discretion. They still use it, and they still stop people. They will simply use some other law that the courts have found to be specific enough to pass constitutional muster.

But when such laws are enforced, there are no low-level guidelines to help police implement them, similar to the enforcement guidelines that were an integral part of Chicago's regime.

I think we need a better way of thinking of the rights at issue in these low-level situations, and *Terry's* flexible approach points the way. At least two principles are useful to think about at this point. The first is community burden sharing, and the second is guided discretion.

I will address burden sharing first. We worry that a majority never shares in the burdens of law enforcement, and instead, pushes those burdens off on a despised minority. In the past courts have responded through community distrust.

But what if it could be said that everyone meaningfully shares in the burden of a particular law enforcement procedure? Something like this could be said of the broad searches that Professor Akhil Amar mentioned yesterday. He suggested that maybe a broad search was not as bad as a more targeted one.<sup>17</sup> Similarly, Professor Bill Stuntz brought up the problem of the targeting harm addressed by the Fourth Amendment.<sup>18</sup> In short, when it can be said that the relevant political community internalizes the burden of a particular enforcement procedure, courts should relax scrutiny of the judgments about the balance between liberty and order produced by the political process.

But it is the guided discretion point that is more important for our purposes here. Guided discretion is a way of demonstrating the relevance of the courts in the political world that Professor Kennedy spoke of. Rather than hoping to specify implementation of police discretion through hyper-precise rules, what the court should do is open and reinforce the channels of political accountability between the community and the police. This is, in

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<sup>16</sup> See *City of Chicago v. Morales*, 687 N.E.2d 53 (Ill. 1997), *cert. granted*, 118 S. Ct. 1510 (1998) (No. 97-1121-CSY).

<sup>17</sup> See Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097 (1998).

<sup>18</sup> See William J. Stuntz, *Terry's Impossibility*, 72 ST. JOHN'S L. REV. 1213 (1998).

my view, the best way of dealing with the exercise of law enforcement discretion in these low-level policing encounters.

How might a court do that? Well, one thing a court can do is actually review the implementing police regulations that accompany a law like Chicago's anti-gang loitering ordinance when a facial challenge is mounted, rather than arguing that such regulations are irrelevant.<sup>19</sup> Such a court would find that the innovative regulations constrained police discretion in useful ways by specifying which officers can enforce them, where they can enforce them, with reasonably detailed guidelines about what establishes probable cause to stop a gang member.

A court could determine how this procedural framework actually creates and reinforces a relationship between the community members and the police. In Chicago, of course, the community members were an integral part of that process. They helped the commander designate which areas the gang loitering ordinance should be enforced in, and they also helped the police officers who enforce the law identify particular gang members against which the law should be enforced.

In 1998, we simply cannot avoid the fact that the ballot box is relevant. This is a point that Judge Juviler made yesterday. We shouldn't be afraid of it. *Terry* may have been ahead of its time in embracing politics, but it is certainly time for us to endorse its promise. Embracing the ballot box does not mean that the majority rule will prevail and that minorities have no say anymore, as I think the experience in Chicago demonstrates. To be afraid of the ballot box, I think, gives minority individuals too little credit.

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<sup>19</sup> See CHICAGO ILL., CODE § 8-4-015 (1992) (providing for the gathering of information on criminal street gang activity, enhanced police patrol of areas having gang activity, and a strong anti-loitering provision which allows police to force persons to disperse when police have probable cause to believe that gang members are loitering).



